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ALBERTA'S FAMILIES

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Peter Lown
Alberta Law Reform Institute

M.L. (Marnie) McCall
Joseph P. Hornick
Canadian Research Institute for Law and the Family

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Abstract

This paper provides general information on the current legal situation of Alberta families with regard to the obligations and rights of family members and to family reorganization following marital breakdown. The nature and scope of the legal issues affecting Alberta families and their members are described. The topics include: the rights and status of children, adult dependent family members and elderly family members; matrimonial property rights and inheritance; marriage breakdown; mediation; property division; support of spouse and child; and custody and access.

Alberta legislation discussed includes: *Child Welfare Act*, *Provincial Court Act*, *Maintenance Order Act*; *Domestic Relations Act*; *Dependent Adults Act*; *Intestate Succession Act*; and *Family Relief Act*.

The purpose of this paper is to provide general background information on the current social and legal situation of Alberta families with regard to family obligations and rights and family reorganization. In each section, available information is presented and the applicable laws are described. Unsettled issues in the law are noted, as are changes in the social situations which may be affected by existing or modified laws.

1.0 Family Obligations and Rights

Family members have mutual obligations towards each other, as well as individual rights. The most common obligation is that of parents towards their children. Parents are responsible for the physical and emotional care of their children, as well as for their financial support. In some cases, children also have obligations towards their parents. These obligations are primarily financial.

Most individual rights are defined and protected under Alberta's *Individuals Rights Protection Act* and the *Canadian Charter of Rights and Freedoms*. Family members also have certain property rights which are covered by provincial legislation.

Table 1 lists the federal and Alberta laws which govern these obligations. All laws must comply with the *Charter of Rights and Freedoms*, which is now part of the Canadian Constitution. As the table indicates, most obligations arise under provincial laws. The nature of the obligations and the legal requirements are described below.

Table 1: Family Obligations--Relevant Legislation

	Alberta Laws	Federal Laws
Rights and Status of Family Members		
Children	Child Welfare Act Provincial Court Act Maintenance Order Act Domestic Relations Act	Criminal Code
Adult Dependent Family Members	Maintenance Order Act Dependent Adults Act	Criminal Code
Elderly Family Members	Maintenance Order Act Dependent Adults Act	Criminal Code
Generally	Individual Rights Protection Act	Canadian Charter of Rights and Freedoms
Property Rights		
Matrimonial Property	Matrimonial Property Act	--
Inheritance	Wills Act Intestate Succession Act Family Relief Act	--

1.1 Obligations Toward Children

Child Support

All parents in Canada have a legal duty under federal legislation to provide the necessaries of life for their children under 16. This obligation can be extended beyond age 16 if the child is ill or disabled (or, in some cases, still being educated) and consequently still dependent on parents to survive. "Necessaries" include food, shelter and essential medical care. Failure to provide these necessaries is a criminal offence (section 215, *Criminal Code*) punishable by up to two years in prison.

Alberta law also imposes on parents the duty to provide adequate food, clothing, shelter and medical care for children under age 16: *Maintenance Order Act*, R.S.A. 1980, c. M-1, s. 2(2). A maintenance order may be made by a court against a person who fails to provide proper maintenance for a child. The court may direct the sheriff to seize and sell that person's property in order to provide the ordered maintenance. Every failure to make an ordered payment is an offence punishable by a fine of up to $500 or up to 3 months in jail if the fine is not paid.

Child Welfare

Children who are neglected or physically, sexually or emotionally abused by their parents may receive protection from the child welfare system. This can range from the family receiving preventive or rehabilitative services in the home (e.g., parent education or counselling) to children being placed temporarily in foster or group homes or even being permanently removed from their parents and placed for adoption or in long-term foster care.

Child protection matters are regulated by the *Child Welfare Act* of Alberta (R.S.A. 1980, c. c-8.1) and administered by Alberta Family and Social Services. Some acts of abuse may also be criminal offenses, such as assault or sexual abuse.

The *Child Welfare Act* states that the maintenance of a child's familial, cultural, social and religious heritage should be taken into account in any decision to remove the child from its family (section 2(f)(i)). This principle has led to recent concerns about the placement of native children in non-native foster homes and whether they should be moved to native foster homes after several years with a non-native family. This requires balancing the importance of the maintenance of the child's cultural background with the importance of maintaining the stability the child has acquired in the new home.

Adoption

Adoption is a legal process by which people can take on parental obligations toward children who are not born to them. Adoption is a legislated method for creating a legal family relationship between unrelated people.

Parents who decide to give up their children for adoption can go through the Department of Family and Social Services. The parents may voluntarily transfer legal guardianship of the children to be adopted to the Department under the *Child Welfare Act*. Children are then placed with adoptive parents who have registered with the Department.

Parents may also choose to go through a private adoption agency or place the child for adoption themselves. In these situations, the parents make a written agreement with the prospective adopting parents to transfer legal guardianship to them or get an order from the court transferring guardianship under the *Domestic Relations Act* (R.S.A. 1980, c. D-37). If the parents of the child were not married, that Act states that the mother is the sole guardian of the child (section 47). Accordingly, she would be the only person required to consent to the adoption and to complete the transfer of guardianship. However, new rules governing private adoption require any adoption placement agency or individual to attempt to notify the biological father of the proposed adoption. The unmarried father may then apply to the court to be made a guardian of the child. If the mother places the child directly, however, the father will not necessarily be notified until the mother applies to transfer guardianship to the adopting parents. The father then may have more difficulty in becoming a guardian if the child has been with the adopting parents for several months. Recent court cases in other provinces also suggest that unmarried fathers should have a say in the future placement of their children and that the laws should be changed either to make both natural parents guardians, whether or not they are married to each other, or to require at least that unmarried fathers be notified in all adoption placements.

The *Child Welfare Act* requires all guardians of a child to consent to the adoption, whether they go through the Department or privately. In addition, a child who has reached the age of 12 must also consent (section 56). A guardian can revoke the consent within 10 days (section 57) and have the child returned. Once an adoption order has been made, the child becomes the child of the adopting parents and ceases to be the child of its birth parents (section 65).

The issue of cultural background has also been raised in adoption matters. An Edmonton couple have recently relinquished to the natural mother a Vietnamese child they were trying to adopt. Before the adoption was final, a judge decided that the disruption to the child of being returned to her mother was less important than being raised in her racial and cultural background. This decision was confirmed by the Alberta Court of Appeal. The Supreme Court of Canada refused leave to appeal, in effect upholding the Court of Appeal decision.

1.2 Obligations Toward Adult Dependent Family Members

A person is responsible to provide the necessaries of life for a person over 18 years of age in his or her care who is unable to withdraw from the care of that person and is unable to provide for himself or herself (*Criminal Code*, section 215). The duty applies to mentally and physically handicapped adults, the elderly, the mentally ill and those in detention who have no other source of support.

Provincial law also imposes an obligation on family members to support their adult members who cannot support themselves. The *Maintenance Order Act* (R.S.A. 1980, c. M-1) obliges the husband, wife, father, mother, grandfather, grandmother and grandchildren of a destitute person who is unable to work for any reason to provide them with food, shelter, clothing and medical care. The destitute person must apply for a maintenance order and the Court must be satisfied the person against whom the order is sought is able to provide the maintenance. The Court can also order other family members to contribute, even if they are not named in the application.

The court may direct the sheriff to seize and sell the property of the person found liable for maintenance in order to carry out the order. Every failure to make an ordered payment is an offence punishable by a fine of up to $500 or up to 3 months in jail if the fine is not paid.

A married person who has been deserted by his or her spouse may also apply under the *Domestic Relations Act* (R.S.A. 1980, c. D-37) for an order for maintenance for the married person and any children. If the court finds the married person has not been deserted, maintenance can only be awarded for the children.

1.3 Obligations Toward Elderly Family Members

As noted above, there is a legal duty imposed by the *Criminal Code* and the Alberta *Maintenance Order Act* to provide for dependent family members, including the elderly who have no other means of support.

Provincial law also provides for the protection of dependent family members who are no longer able to manage themselves or their affairs. A guardian can be appointed for such a person under the *Dependent Adults Act* (R.S.A. 1980, c. D-32). Although the Act was passed primarily for the benefit of mentally handicapped adults, it may also be used with respect to the mentally incapacitated, whether through mental illness or diminished ability due to aging. The terms of the guardianship order can be tailored to the needs of the elderly person.

For example, the person may be able to look after his or her own physical needs, but no longer be able to understand financial matters.

A person may decide to grant a power of attorney over their affairs to another person. Historically, a power of attorney expired if the grantor became mentally incapacitated, although changes to the law in many other provinces now permit enduring powers of attorney. This allows people to plan in advance how they wish their affairs to be handled if, in the future, they are unable to manage them for themselves.

Elderly people may also be the victims of abuse at the hands of family members or other caretakers. A recent survey of Canadians over age 65 determined that about 4% of elderly persons were victims of one or more of financial (2.5%), verbal (1.4%) or physical (0.5%) - abuse and neglect (0.4%). *Criminal Code* provisions against physical (ss. 265-269) or sexual assault (ss. 271-273) could provide some protection. Although most victims reporting assaultive behaviour had been injured, only 1/4 sought medical attention or notified the police. Certain kinds of verbal/emotional abuse may also be criminal offenses, such as intimidation or threatening (s. 423).

Many types of financial abuse may also fall within the scope of the criminal law. For example, forgery, fraud, extortion, breach of trust, misuse of power of attorney and theft are all criminal offenses, carrying penalties ranging from a maximum of 6 months' imprisonment for fraud or theft under $1000 to a maximum of life imprisonment for extortion.

Protection for the elderly is also available through the civil law. A person who has been influenced or forced by another to give them money or property may be able to sue to get it back.

1.4 Property Rights

Property Rules, Title and Ownership

Property may be owned legally or beneficially. Legal ownership (or title) indicates the person in whose name the property is registered. Beneficial ownership describes the actual rights to the property (who has the benefit of it). For example, one spouse may be the registered owner of a motor vehicle, but it may actually be owned by both of them (for example, to take advantage of lower insurance rates). Title is indicative, but not conclusive, of ownership. If there is a difference between the legal and the beneficial ownership of property, the person whose name is on the title is a trustee for the beneficial owner.

Complete reliance on the legal ownership of property causes great hardship to the beneficial owner. Recognizing this, the law developed the trust mechanism as a remedy. If two or more people have agreed that the legal owner (titleholder) will hold the property on their behalf, a trust is imposed on the legal owner so that agreement can be given effect. In the

motor vehicle example above, for instance, two people could have contributed to the purchase price, but the title is registered only to one of them.

Even if one person provided the purchase money and took title, another person may have provided some other contribution with the expectation of receiving a benefit in return. If the purchaser does not provide the expected benefit, the purchaser might be unjustly enriched at the expense of the other person. The trust mechanism could be used to prevent that unjust enrichment.

In many cases, the trust would have to be proven in court. This can be complicated by such things as whether the contribution was a loan, a gift or something else. In addition to proving that the person with title has been unjustly enriched, the person trying to establish the trust must prove that he or she has suffered a corresponding deprivation.

Matrimonial Property

Historically, married women were not able to own property. Any property they owned prior to marriage became the property of their husband. In 1922, *The Married Women's Act* (now R.S.A. 1980, c. M-7) provided that a married woman could own and deal with both real and personal property in the same way as an unmarried woman (who could do whatever a man could do with property). This supposedly put the married woman on the same footing as her husband. However, the married woman did not have the same income-earning capacity as her husband and household and maternal duties further impeded that capacity. Consequently, most property continued to be acquired by the husband and registered in his name.

Several famous cases were heard by the courts in the 1970s and 1980s. These cases highlighted the difficulties faced by the no-owner spouse at the end of marriage who had contributed to the family's economic and social welfare during the marriage. While the unfairness of denying the non-owner spouse a share of the family property was recognized, it took some time to establish just what level of contribution would justify awarding a share of the property to that spouse. Should it require financial contribution? labour over and above the "normal" family duties? Or should fulfilling the usual role of homemaker be sufficient?

The rule now seems to be that a contribution to the acquisition or maintenance of property in the reasonable expectation of receiving an interest in the property will allow the court to impose on the legal owner of the property a constructive trust in favour of the contributor.

What is still not clear is whether housekeeping services alone would give rise to a claim for a share of property. In the most recent court decision, housekeeping services, in conjunction with other services, were considered to be a valuable contribution entitling the contributor to a share in the property.

The *Matrimonial Property Act* (R.S.A. 1980, c. M-9) establishes a system for the distribution of property acquired during the marriage upon the termination of the economic partnership of the spouses. The Act sets up the following principles:

- On marriage breakdown (determined by the happening of certain triggering events specified in the Act), the right to share property arises
- Property acquired during the marriage (other than gifts) is subject to a presumption of equal sharing. This presumption may be rebutted by showing that an equal division would be unjust and inequitable. In deciding whether to ignore the presumption, the court must consider the effect of 13 specified factors.
- The value of certain types of property, such as gifts, is exempt from distribution. The value of other specified property, such as increases in the value of a gift, is treated as shareable if that is just and equitable having regard to the 13 factors. In this situation, there is no starting presumption of equal sharing.
- Spouses may change or modify these rules by entering into a legal contract.

Apart from dealing with rights of ownership, the *Matrimonial Property Act* permits one spouse to obtain exclusive possession of the matrimonial home and household effects.

The combination of common law and statutory remedies creates a complex variety of possible schemes for the ownership of property during marriage. These possibilities are:

- Party choice: The parties may choose their own rules for distribution of property if the marriage breaks down. Prior to that time, the spouses can be separate as to property, meaning that each owns what he or she acquires. Alternately, they will be governed by the rules they have mutually chosen.
- Common law remedies: These remedies (such as the trust provisions described above) apply to reduce the hardship of the separate property rules. They cannot be used to override an agreement the parties have already made on the rules to be applied to property ownership.

Once the marriage has broken down, several possibilities arise:

- *Matrimonial Property Act*: This law allows the parties to ask the court to divide the property acquired during marriage in a just and equitable proportion, having regard to the 13 specified factors. One spouse must apply for a property division and the court can only distribute the property if marriage breakdown can be established according to the criteria in the Act. The spouses can contract out of all or part of the Act by an agreement in writing, signed and acknowledged by each of them in front independent lawyers (section 38).
- Separate Property: If the parties do not apply for a property distribution under the Act, they elect to stay with the common law rules or any previous contract they have made.

Several issues still exist with regard to the distribution of property after marriage breakdown:

- Value of Homemaking: The one issue that has arisen consistently is the valuation and recognition of homemaking work. Should it be recognized as a contribution to the acquisition of family property? Is it even necessary to speak of contribution or should it be assumed that such work is part of the normal partnership of marriage? Is it reasonable to place the onus on the non-earning (or part-time-earning) spouse to prove the worth of contributions to home and family?
- Property litigation: It is expensive to take property disputes to court. Even though the interpretation of the *Matrimonial Property Act* has now settled down to a point where the application of the 13 discretionary factors is quite well understood, there remains a degree of uncertainty. This makes litigation expensive and risky. In addition, the common law trust remedies are so highly discretionary that they suffer even more from the criticisms of cost and uncertainty.
- Intangible Property: There are types of property which are difficult, if not impossible to divide, but which represent a valuable asset to the individuals. At present, the division of pension benefits, Canada Pension Plan contributions and other similar assets remains somewhat in limbo.
- Confusion between Property and Support: Instalment payments made by one spouse to another to carry out a division of property must be clearly understood to be different from regular payments made for the support of the other spouse. Instalment payments towards a property division would continue even if the other spouse remarried. Support payments, on the other hand, would almost always end on remarriage.
- Unmarried Couples: The increasing incidence of non-married persons living together has led to increasing litigation when the cohabitation terminates. The separate property rules would normally apply in this situation, unless the couple had made other arrangements by way of a contract. In the absence of such an agreement or being able to prove that a contribution to property has created a trust, few provisions in the law deal specifically with the situation of unmarried cohabitants.

Inheritance (Succession)

Succession laws allow people to provide for the distribution of their property after their death in a number of ways. Many people choose to register property jointly with their spouses (called joint tenancy). Not only does this give husbands and wives equal rights to the use and enjoyment of the property while they are both alive, the property passes directly to the surviving joint tenant without having to go through the estate of the deceased spouse. Arrangements can be made to ensure that certain other property does not have to be processed through the estate. The most common of these is naming the beneficiary of an insurance policy; the insurance money will then go directly to that person.

The *Wills Act* (R.S.A. 1980, c. W-11) describes the formal requirements for making a will. Some special status is also provided for family members. This Act enshrines the principle of freedom of testation: the testator (the person making the will) can decide in his or her complete discretion where the property is to go.

If no will has been made, or if some property is not covered by the will, the *Intestate Succession Act* (R.S.A. 1980, c. I-9) specifies where the property will go. Property is distributed first to children, then spouse, then other blood relatives. The surviving spouse has certain preferred rights to a portion of the estate.

The *Family Relief Act* (R.S.A. 1980, c. F-2) allows the court to interfere with the distribution of an estate if a dependent can prove that the testator did not make adequate provision for the dependent's support. In most cases, such awards have been relatively modest. Only in very large estates has this Act been used to give a large amount to a person who was otherwise disinherited.

2.0 Family Reorganization

The focus of the discussion in this part of the paper is the process and consequences of marriage breakdown. The effects of remarriage on certain of these consequences will also be noted. In many cases, however, the "reorganization" of the family is simply its division into two parts: a lone-parent with one or more children and one unattached individual.

Table 2 describes the federal and provincial laws which relate to situations of marriage breakdown. The process of marriage breakdown, including the methods for resolution of issues and the issues to be resolved, is illustrated in Figure 1.

Table 2: Family Reorganization -- Relevant Legislation

	Alberta Laws	Federal Laws
Marital Breakdown		
Mediation	--	Divorce Act
Divorce	--	Divorce Act
Property Division	Matrimonial Property Act	--
Support	Domestic Relations Act Maintenance and Recovery Act Maintenance Enforcement Act Reciprocal Enforcement of Maintenance Act	Divorce Act
Custody and Access	Domestic Relations Act Provincial Court Act Extra-Provincial Enforcement of Custody Orders Act International Child Abduction Act	Divorce Act

Figure 1: The Process and Outcomes of Marriage Breakdown

2.1 Court Proceedings and Mediation

In recent years, considerable attention has been drawn to the emotional and financial stresses of lengthy court proceedings relating to marriage breakdown. Mediation services have been established and are a growing feature of the divorce process.

The purpose of mediation is to have the divorcing couple settle their own affairs with the assistance of a neutral third party who provides a framework for addressing all the issues which must be resolved. The theory behind mediation is that the parties will be more satisfied with an agreement they design than with anything a court may decide. Mediation may also enable the couple to resolve the emotional side of the divorcing process.

Divorcing couples who wish to use mediation may do so at any time during the divorce proceedings. Many lawyers now refer their clients to mediation before taking more than the preliminary legal steps in obtaining a divorce. A couple who has reached an agreement in mediation and had it approved by their lawyers (or at least have received legal advice about the consequences and advisability of the mediated agreement) can then use the simplified divorce procedure and they will not have to appear in court themselves. Settlements can also be reached by negotiation between the husband and wife and/or their lawyers. If an agreement can be reached through negotiation, then the simplified divorce procedure can also be used.

If mediation and/or negotiation does not result in a settlement and there are disputes about custody and/or access, couples in Calgary and Edmonton must go through the Custody Mediation Project before their divorce can go to court.

2.2 Divorce

Divorce is governed by a federal law which applies everywhere in Canada. Divorce laws cover the grounds on which a divorce may be obtained and the awarding of support for spouses and children.

In 1985, a number of fundamental changes were made to divorce law. The grounds for obtaining a divorce were changed and new rules affecting the granting of support for spouses and children were introduced. Marriage breakdown is the sole ground for obtaining a divorce under the new law. To establish that a marriage has broken down, the spouse applying for the divorce must show that the spouses have lived apart for one year or that the other spouse has committed adultery or has been physically or mentally cruel to the applicant spouse.

In addition to obtaining the actual divorce, spouses must settle issues of spousal and child support and the division of property acquired during the marriage. As noted above, these questions can be settled by the spouses themselves through negotiation or mediation, or can be referred to the court for a decision.

2.3 Support

Spousal Support

Spousal support may be awarded to a dependent spouse under either the *Divorce Act* or the Alberta *Domestic Relations Act*.

The *Divorce Act* sets out the objectives the court is to consider in deciding whether to award support and, if so, the amount. According to section 15(7), a support order should:

- recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above the obligation apportioned between the spouses [for child support];
- relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

If the amount of support has been decided between the spouses and recorded in a final separation agreement, it will be very difficult to have the amount increased unless the agreement specifically permits changes to be made if circumstances have changed. If there is no provision, spousal support can be increased only if there has been a radical change in circumstances that is unexpected and connected to the marriage itself. On the other hand, the paying spouse may have the payments reduced if there has been a radical, unexpected change in circumstances which does not have to be related to the marriage.

In most cases, the marriage breakdown will cause economic disadvantage and possibly hardship for the lower-earning or non-earning spouse (usually the wife) by the removal of the majority of the family income. Even though almost 2/3 of married women in Alberta are employed in the labour force, many work part-time or in low-paying clerical and service occupations. Childrearing responsibilities often limit the ability of a woman with young children to obtain education, training or employment. The cost of substitute child care for young children can be an added barrier to achieving a greater degree of economic self-sufficiency. Alberta does provide full or partial day-care subsidies for low-income families. As of the new rates introduced September, 1989, full subsidy is available for a single parent with two children with a net income of $1250 or less per month ($1430 for a couple with two children). Eligibility for any amount of subsidy ends once net income reaches $2001 per month ($2181 for the couple).

Spouses who have been out of the work force for extended periods of time, such as older homemakers, may face difficulty in finding employment at all due to their age and absence

from waged work. Loss or obsolescence of skills may limit employment opportunities to minimum-wage, primarily part-time occupations. Full-time employment at Alberta's $4.50 minimum wage provides an annual income of $9360. The National Council of Welfare poverty line for a single person in one of Alberta's major cities is now $13,485 per year.

The *Domestic Relations Act* allows a court to order support for a spouse in limited circumstances. An interim order for alimony cannot be made if the spouse has sufficient means of support from any other source. This Act may be used to obtain a support order after separation and before an application for divorce has been made. Because of the limited circumstances in which maintenance will be granted under the Alberta legislation, the preferred procedure is to start the divorce case and apply for interim support under the *Divorce Act*.

Child Support

Child support for children of married parents may be granted by a court under either the *Divorce Act* or under the *Domestic Relations Act*. Different rules apply, depending on which Act is being used.

Under the *Divorce Act*, child support is declared to be the joint responsibility of the parents and each is expected to contribute to the support of their children in proportion to their respective ability (i.e., income). A child is defined as being under 16 or unable to support himself or herself by reason of illness, disability or other cause (usually interpreted to include undertaking education).

The *Domestic Relations Act* permits a judge to order a spouse to pay support for children in an amount the judge considers reasonable having regard to the means of both spouses. There is no definition of child in the act and it must be assumed that a person under the provincial age of majority (18 years) would be entitled to support.

A 1981 study in Alberta found that the average child support award was less than $50 per month, with only about 20% ranging between $75 and $125 (ILRR, 1981). This same study found that, in almost one-third of Supreme Court (i.e., divorce) cases, no child support was granted at all. Also, the study determined that the child support awards obtained by women who were receiving social assistance were $47 per month lower than those obtained by women who were not.

More recently, a 1988 study of awards in Calgary divorce files (Brown, 1988) showed an average award of $212 per child per month (or $2,544 per year). Again, if the award is assumed to be half the actual cost ($5,088 per year), it is still below the conservative estimate of the cost of raising a child of $5,555 U.S. (Cutler, 1989 -- $100,000 U.S. 0-18 years; annual average = $5,555 U.S. or approximately $6444 Can.).

Procedures for obtaining child support for the benefit of children of unmarried parents are provided under the *Maintenance and Recovery Act* (R.S.A. 1980, c. M-2, Part 2). A complaint against the alleged biological father must be made within two years of the birth of the child or within one year of any act of the alleged father which can be taken as an acknowledgement of paternity. If the court is satisfied, the person can be declared to be the father for the purposes of the act. The court can then determine the appropriate amount of support, if any, to be paid.

Enforcement

Once support has been ordered, it must still be collected. In Canada, between 25% and 33% of fathers make no payments at all. Even those fathers who made payments averaged only 33% of the ordered amount (Steel, 1986). Between 70% and 80% of fathers who are in default could actually afford to pay (ILRR, 1981). The Alberta study (ILRR, 1981) found that 63% did not pay because they believed their children's mothers didn't need the money or weren't using it for the children. In addition, 25% of the defaulting fathers believed that their children were now the sole financial responsibility of their mothers.

If payments aren't made, the person entitled to receive the payments usually has to apply to the court to have the order enforced. Under both the *Maintenance Enforcement Act* and the *Maintenance Recovery Act*, the court has a range of methods to compel payment, including seizing and selling property and sending the defaulter to jail. Support orders from other provinces can be enforced in Alberta under the *Reciprocal Enforcement of Maintenance Orders Act* (R.S.A. 1980, c. R-7.1). Orders made by Alberta courts can be enforced outside Alberta in all provinces, many U.S. states and several other countries having equivalent laws.

Alberta implemented a system of government maintenance enforcement in February, 1986 (*Maintenance Enforcement Act*, R.S.A 1980, c. M-0.5). Under this Act, people with support orders could register them with the Director of Maintenance Enforcement to be collected. As of January 1, 1987 all new support orders made by a court in Alberta or registered in Alberta from other provinces are automatically registered with the Maintenance Enforcement Program and payments must be made through the Director unless the recipient withdraws from the Program.

A recent story in The Globe and Mail reports that just 32.5% of Alberta fathers are in full compliance with their child support orders, while 15% make no payments at all (Nov. 21, 1989, p. 1). Program figures indicate that at least some payment was made on 62% of all files between April 1 and December 31, 1989.

2.4 Custody

Custody of children can be decided under either the *Divorce Act* or the *Alberta Domestic Relations Act*. The tests for deciding which parent shall have custody are somewhat different under the two acts.

In the *Divorce Act* (section 16(8)), the court is directed "to take into consideration only the best interest of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child." The conduct of the parents in the marriage is not relevant to a custody decision unless the conduct directly affects parenting ability. Another factor the court can consider is which of the two parents is most likely to encourage access by the other parent.

Under the *Domestic Relations Act*, the court "shall have regard to" the child's welfare, the conduct of the parents, and the wishes of both the mother and the father.

Joint Custody

The concept of joint custody following divorce has received a lot of attention in the last few years. Some American states have made joint custody the preferred decision, while others have simply made joint custody an option. The *Divorce Act* permits an order of joint custody to be made.

Joint custody may be either legal or physical. Legal joint custody gives both parents equal rights to make major decisions for the child. Major decisions include such things as education, religious training and major medical decisions. Joint legal custody requires that the parents be able to agree on these matters. If they cannot, they may have to apply to the court to resolve the problem.

Joint physical custody is also referred to as shared parenting. In theory, joint physical custody involves the child living for equal amounts of time with each parent. In practice, however, joint physical custody awards tends to specify that the child's primary residence is with one parent the majority of the time and the other for a much smaller amount of time. There is very little difference in effect from a more traditional order of sole custody to one parent and access to the other.

An award of joint custody, whether legal or physical, may have the effect of reducing the amount of child support that would have been awarded to a parent with sole custody. Even if the child does spend equal amounts of time with each parent, there is no consequent reduction in the costs to the parents, as housing, utilities, etc., cannot be reduced for the periods the child is not present.

Mobility

In order to maintain the child's contact with both parents after divorce, courts may place restrictions on the right of either parent to move. In most cases, the restriction is placed on the mother, since children most often remain with their mothers. The ability of the mother to become self-sufficient (as required by the spousal support provisions of the *Divorce Act*, 1985) or even to earn enough to support the children in her custody may be limited if she is unable to pursue education or improved job opportunities. Mothers who have remarried have been told by courts that they can follow their transferred husbands or they can have their children, but the children aren't to be moved. Such a situation can put a tremendous strain on a new marriage.

In situations where one parent has sole custody, which has formerly carried it with it the absolute right to determine where the child will live, courts have prevented a move because it would interfere with the other parent's right of access. If the access parent refuses to agree to new arrangements, the custodial parent will probably not be permitted to take the children if the move goes ahead.

Violation of Custody Orders

The *Extra-Provincial Enforcement of Custody Orders Act* (R.S.A. 1980, c. E-17) provides for the registration and enforcement in Alberta of custody orders made in other provinces or countries. All other provinces, some American states and several other countries have similar legislation which allows the registration and enforcement of Alberta custody orders outside Alberta. Prior to the introduction of this type of legislation, one parent could defeat a custody order by moving to a different province and getting a new custody order. This law presumes that the custody order made in the original place was proper and any changes to it should normally be made by the original court.

On occasion, some parents decide to take the law into their own hands and kidnap their children in order to prevent the other parent from having custody. Parental abduction sometimes happens before a court order for custody has been made and sometimes after if the parent disagrees with the order made by the court. Taking a child away with the intention of preventing the other parent from having custody or access is a criminal offence, whether or not there is a court order for custody and/or access (*Criminal Code*, ss. 282 and 283). Charges can be laid against abducting parents and Canada-wide warrants can be issued for their arrest. In addition, Canada is a signatory of the *Hague Convention on the Civil Aspects of International Child Abduction*, the aim of which is to locate and return children who have been taken out of home country to another signatory country. The *International Child Abduction Act* (R.S.A. 1980, c. I-6.5) can be used to obtain the return of an Alberta child from another signatory country or to return a child brought to Alberta to its home country.

2.5 Access

In the last few years, concerns have been raised about the courts' unwillingness or inability to enforce access orders. Most of the discussion has centred around access to a child being denied to a parent who is entitled to it. Conversely, failure of parents with access to see their children is also a considerable problem.

There are no reliable estimates of the number of parents who experience access problems. The only available figures indicate that about 15% of custody and access orders are brought back to court, mostly to change the terms of the order. Many people who are having problems may not go back to court. People who have settled custody and access by agreement without a court order may also have problems. In addition, a recent survey of Canadians over age 65 revealed that about 4% have been denied access to their grandchildren.

A parent who has been denied access currently has the right to apply to the court for an order holding the other parent in contempt of court. Contempt of court is punishable by fine, imprisonment or the imposition of conditions of behaviour in order to avoid fine or imprisonment. Commonly, a person found to be in contempt of a court order is required to comply with the order in future. Failure to do so within the time or manner required by the court can result in a fine or imprisonment.

Legislation has been introduced in several provinces to establish an access enforcement procedure/system to parallel the maintenance enforcement systems. Manitoba began a 3-year pilot access assistance program in Winnipeg in the spring of 1989. The purpose of the program is to try to have the parents settle the problem themselves. Mediation services are provided to assist the parents in doing this.

In Alberta, private members' bills have been introduced in the last three sittings, the most recent being Bill 221, *Children's Access Rights Enforcement Act.* The bill calls for amendments to the *Alberta Domestic Relations Act* and the *Alberta Provincial Court Act.* The bill is patterned after the Ontario amendments to the *Children's Law Reform Act* and addresses both kinds of access problems. Mediation is also encouraged as a mechanism to settle access disputes. Parents with access disputes may be able to receive assistance from the Custody Mediation Project offices in Calgary and Edmonton.

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